No. 09-413

In The Supreme Court of the United States

Supreme Court, U.S.
FILED
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JIMMY HUSBAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR REHEARING

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In The Supreme Court of the United States

JIMMY HUSBAND,
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vs.

UNITED STATES OF AMERICA
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On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit
Appellate Case No. 08-8330

PETITION FOR REHEARING

Petitioner respectfully petitions for rehearing of this Honorable Court's November 9, 2009 decision, denying his petition for writ of certiorari. Petitioner seeks review of the Fourth Circuit Court of Appeal's denial of a certificate of appealability for his 28 U.S.C.A. § 2255 motion.

GROUNDS FOR REHEARING

Petitioner asks this Honorable Court, pursuant to rule 44.2, to reconsider its decision to deny Petitioner's Petition for a Writ of Certiorari. Although Petitioner recognizes that this Honorable Court rarely grants a Petition for Rehearing, Petitioner believes that the following grounds are of great significance and offers additional grounds for this Honorable Court's consideration. Petitioner respectfully contends that it would be a great injustice to not fully consider them at this juncture.

Of great importance to this case as a whole are the questions of (1) whether the statute of limitations had run prior to the government's indictments; and, (2) whether Petitioner's counsel was ineffective for not raising (or even considering) a statute of limitations defense prior to trial. To answer the latter, one need only consult the Second Circuit's decision in United States v. Hansel, 70 F.3d 6 (2nd Cir. 1995). There, like the instant matter, counsel did not raise a statute of limitations defense and, as a result, the defendant pled guilty (without a plea agreement) to time-barred counts. The Court held that counsel's representation fell below the Strickland standard, as the "failure to object to the time-barred counts is unaccountable in the circumstances, and cannot 'be considered sound trial strategy.'" Id. at 8.

Turning then to the first query, in its *per curiam* opinion denying Petitioner's request for a certificate of appealability, the Fourth Circuit broadly held that Petitioner did not demonstrate that reasonable jurists could debate the merit of his claims. However, Petitioner believes that not only could a reasonable jurist come to a different conclusion on the statute of limitations issue, but, in fact, one reasonable jurist already has. Notably, in the context of a 18 U.S.C. § 2255 civil trial involving this Petitioner and the victim in the criminal case, a judge of the Norfolk Division of the Eastern District of Virginia applied a thorough and complete analysis of the facts to determine whether the victim's claim could satisfy the six year limitations period of 18 U.S.C. § 2255.

This decision was not mentioned in Petitioner's original writ. In that case, the learned district court judge found that the cause of action accrued from the date of alleged offense (i.e., the depiction) occurred, which is exactly what Petitioner is arguing in this instant matter. See Smith v. Husband, 376 F. Supp. 2d 603, 615 (E.D.Va. 2005) ("Plaintiff's suit was brought more than six years after any of Defendant's conduct for which she can pursue a claim under § 2255.")[1] Thus, the thorough

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[1] Nevertheless, the district court denied Petitioner's motion to dismiss that case, finding that the doctrine of equitable tolling applied if the plaintiff could demonstrate a violation

analysis conducted by the district court in that case, and the conclusions drawn from same, demonstrate that another jurist could find differently than the district court that decided Petitioner's § 2255 motion.

Moreover, Petitioner believes that a panel of the Fourth Circuit has already found in United States v. Buculei, 262 F.3d 322, 328 (4th Cir. 2001), that the statute of limitations runs from the criminal act itself (i.e., the date which the depiction occurred). Petitioner respectfully contends that Fourth Circuit has ignored that case by instead holding that the jurisdictional element controls the statute of limitations.

In reaching that finding, the Fourth Circuit has labeled 18 U.S.C. § 2251(a) an inchoate, continuing offense. This conclusion is inapposite to both precedent of this Honorable Court and opinions from other Circuits (which Petitioner did not mention in his original writ). See United States v. Midstate Horticultural Co., 306 U.S. 161, 166 (1939) ("A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy."); United States v. McGoff, 831 F.2d 1071, 1078-79 (D.C. Cir. 1987) ("A 'continuing offense' . . . is an unlawful course of conduct that

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of the enumerated statutes that occurred after December 1, 1997. All of the indictments in this instant matter, though, alleged events which occurred before that date.

does perdure. . . . the statute of limitations as to prosecutions for continuing offenses runs from the last day of the continuing offense."). See also United States v. Benton & Co., 345 F. Supp. 1101, 1103 (M.D.Fl. 1972) ("The only issue here, therefore, is whether the defendant is charged with an offense which is continuing in nature, for where that is the case the *indictment or information* need not allege the date of the commencement of the violation, but *need only allege that the last act in the commission of the crime occurred within the statute of limitations.*") (emphasis added.) Here, not only does the offense itself not meet the criteria of a continuing offense, the indictments returned against Petitioner do not allege when the last act (i.e., the jurisdictional element) occurred.

While Petitioner believes that his statute of limitations argument is sound, assuming *arguendo* that this Honorable Court should find the limitations period had not run, the determination of the proper sentencing guidelines is necessary to determine whether Petitioner was properly resentenced. As argued in the petition for writ of certiorari, the indictments alleged that the visual depictions occurred in 1995. Again, assuming *arguendo* that the Fourth Circuit's declaration that Petitioner's offenses were continuing in nature was correct, the use of the 2002 version of the guidelines constituted an Ex Post Facto violation, as those

guidelines exposed Petitioner to a higher sentence than he faced under the 1995 guidelines.

At Petitioner's first sentencing event, the district court *agreed that the 1995 version was correct* and effected sentencing using a 20-87 month guideline range. On direct appeal, the Fourth Circuit, upon finding the offense inchoate until 2001, held that the 2002 guidelines should have been used. The court nevertheless affirmed, citing the fact that the substantial rights of the defendant were not violated, as he could have gotten more time under the 2002 guidelines than he actually received. That finding, in and of itself, suggests as Ex Post Facto violation.

After remand from this Honorable Court, the district court, *sua sponte*, determined that the 2002 guidelines were proper and resentenced Petitioner using same. Under these guidelines the statutory maximum is twenty (20) years, whereas under the 1995 guidelines (i.e., the guidelines in place at the time the depictions were made) the statutory maximum was ten (10) years. As noted above and as discussed in more detail in the petition itself, the use of the 2002 guidelines constituted an Ex Post Facto violation, since those guidelines subjected Petitioner to a higher sentence than the 1995 guidelines did.

In addition to the foregoing, Petitioner also believes that the district court failed to follow the

mandate of this Honorable Court to properly resentence him in light of United States v. Booker, 543 U.S. 220 (2005). At resentencing, the district court employed guidelines that calculated a range of 87 to 108 months of incarceration. However, the district court, in this case, instead sentenced Petitioner to thirty years (i.e., a sentence in excess of the total punishment under the guidelines), which it accomplished by "stacking" consecutive sentences. Petitioner respectfully contends that the Fourth Circuit conducted only a cursory review of the resentencing for reasonableness and, furthermore, refused to address this issue raised in the instant matter.[2] That opinion is attached hereto.

Normally, "[i]n the case of multiple counts of conviction, the guidelines instruct that if the *total punishment mandated by the guidelines* exceeds the highest statutory maximum, the district court must impose consecutive terms of imprisonment to the extent necessary to achieve the total punishment." United States v. White, 238 F.3d 537, 543 (4th Cir. 2001) (citing USSG § 5G1.2(d)) (emphasis added). Petitioner believes that the scheme outlined above would allow the district court to order consecutive

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[2] Where, as here, a district court varies substantially from the guidelines, the Fourth Circuit has stated that "when the variance is a substantial one . . . we must more carefully scrutinize the reasoning offered by the district court in support of the sentence." United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006). Petitioner respectfully suggests that his sentence never received such scrutiny.

sentences if the properly calculated guideline range exceeded the statutory maximum. Clearly, it did not (even though the wrong guidelines were used), as the statutory maximum on one count sufficiently encompassed the total punishment contemplated by the guidelines. Therefore, the Petitioner respectfully asserts that the district court violated the Sixth Amendment by sentencing him to consecutive sentences -- on multiple counts of the same offense -- in excess of the statutory maximum.

This Honorable Court explored the issue of consecutive sentencing in Oregon v. Ice, 129 S. Ct. 711 (2009), and based its opinion on the sovereignty of each state to legislate a sentencing scheme. Petitioner believes, however, and asks this Honorable Court to confirm, that based on the Federal Sentencing Guidelines and applicable statutes that it is a violation of the Petitioner's Sixth Amendment rights and applicable case law to sentence a defendant with multiple counts of the same offense (with the same statutory maximum) to consecutive sentences, resulting in a sentence that is in excess of the statutory maximum.

CONCLUSION

The Petitioner respectfully believes he has brought forth vital information that shows without a doubt that other jurists of reason could have found different answers to the issues raised in his 28

U.S.C.A. § 2255 motion and that, consequently, the Fourth Circuit erred in denying Petitioner's request for a certificate of appealability.

WHEREFORE, Petitioner respectfully prays that this Honorable Court reconsider its prior decision and grant his petition for writ of certiorari.

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CERTIFICATE

Pursuant to this Honorable Court's Rule 44.2, Petitioner hereby certifies that this Petition for Rehearing is limited to intervening circumstances of a substantial and controlling effect or to other substantial grounds not previously presented in his initial writ. Petitioner hereby certifies that this Petition for Rehearing is presented in good faith and not for delay.

Brian S. Foreman

ATTACHMENT

UNITED STATES OF AMERICA, Plaintiff - Appellee, versus JIMMY RICHARD HUSBAND, Defendant - Appellant.

No. 06-5208

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

235 Fed. Appx. 55; 2007 U.S. App. LEXIS 12734

April 20, 2007, Submitted
June 1, 2007, Decided

NOTICE: [**1] PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Rebecca Beach Smith, District Judge. (4:02-cr-00125).
United States v. Husband, 235 Fed. Appx. 54, 2006 U.S. App. LEXIS 19145 (4th Cir., 2006)

DISPOSITION: AFFIRMED.

COUNSEL: Marcia G. Shein, LAW OFFICES OF MARCIA G. SHEIN, P.C., Decatur, Georgia, for Appellant.

Chuck Rosenberg, United States Attorney, Michael C. Moore, Assistant United States Attorney, Norfolk, Virginia, for Appellee.

JUDGES: Before WILKINSON, GREGORY, and SHEDD, Circuit Judges.

OPINION

[*56] PER CURIAM:

Jimmy Richard Husband appeals the sentence imposed following remand for resentencing. In our initial decision, we affirmed Husband's convictions and 696-month sentence for eight counts of coercing or using a minor to engage in sexually explicit conduct for the purpose of producing a videotape of that conduct, which was then transported in interstate commerce. *United States v. Husband, No. 03-4630, 119 F. App'x 475 (4th Cir. 2005).* In compliance with the mandate of the Supreme Court that vacated our decision, *see Husband v. United States, 546 U.S. 802, 126 S. Ct. 322, 163 L. Ed. 2d 30 (2005),* [**2] we affirmed Husband's convictions, but vacated his sentence and remanded for resentencing pursuant to *United States v. Booker, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). United States v. Husband, No. 03-4630, 235 Fed. Appx. 54, 2006 U.S. App. LEXIS 19145, 2006 WL 4468334 (4th Cir. June 1, 2006)* (unpublished). On remand, the district court sentenced Husband to thirty years of imprisonment, followed by three years of supervised release. We now affirm Husband's sentence.

On appeal, Husband contends that the district court imposed an unreasonable sentence and erred in departing upward from the guidelines range. In imposing a sentence after *Booker*, the district court

must first correctly determine, after making appropriate findings of fact, the applicable guidelines range. *United States v. Hernandez-Villanueva, 473 F.3d 118, 122 (4th Cir. 2007).* "Next, the court must 'determine whether a sentence within that range . . . serves the factors set forth in *§ 3553(a)* and, if not, select a sentence [within statutory limits] that does serve those factors.'" *Id.* (quoting *United States v. Green, 436 F.3d 449, 456 (4th Cir.), cert. denied, 126 S. Ct. 2309, 164 L. Ed. 2d 828 (2006)).* [**3] The district court must then articulate the reasons for the sentence imposed, particularly explaining any departure or variance from the guidelines range. *Id.* "The explanation of a variance sentence must be tied to the factors set forth in *§ 3553(a)* and must be accompanied by findings of fact as necessary." *Id. at 122-23.*
We review the resulting sentence for reasonableness, considering "the extent to which the sentence . . . comports with the [*57] various, and sometimes competing, goals of *§ 3553(a).*" *United States v. Moreland, 437 F.3d 424, 433 (4th Cir.), cert. denied, 126 S. Ct. 2054, 164 L. Ed. 2d 804 (2006).* A sentence is unreasonable if the "court provides an inadequate statement of reasons or relies on improper factors in imposing a sentence outside the properly calculated advisory sentencing range . . . ." *Hernandez-Villanueva, 473 F.3d at 123.* "The district court need not discuss each factor set forth in *§ 3553(a)* 'in checklist fashion;' 'it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.'" *Moreland, 437 F.3d at 432* [**4] (quoting *United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005)).*

Based on our review of the record, we find that the district court properly sentenced Husband after considering and examining the sentencing guidelines and the *§ 3553(a)* factors, as instructed by *Booker*. The district court recalculated the sentencing guidelines based on the previous findings of this court and then proceeded to thoroughly examine the *§ 3553(a)* factors and concluded that the factors supported an upward departure from the guidelines range. We find that the resulting sentence was reasonable.

We therefore affirm Husband's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED